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March 28, 1994

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Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

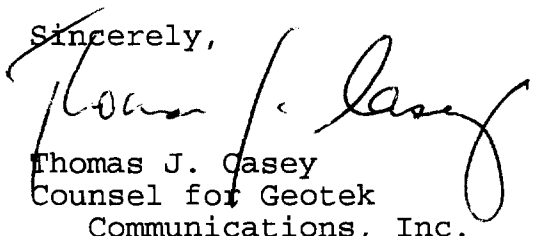
Re: First Report and Order, PP Docket No. 93-253
Petition for Reconsideration

Dear Mr. Caton:

Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, Geotek Communications, Inc., by its attorney, hereby submits one original and ten copies of its Petition for Reconsideration filed March 28, 1994.

If you have any questions, please contact the undersigned.

Sincerely,


Thomas J. Casey
Counsel for Geotek
Communications, Inc.

Attachments

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MAR 28 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket 93-253
of the Communications Act)
Competitive Bidding)

PETITION FOR RECONSIDERATION

INTRODUCTION

In the First Report and Order in the competitive bidding proceeding, __ FCC Rcd __ (1994) ("Auction Order"), the Federal Communications Commission ("FCC" or "Commission") adopted rules requiring an applicant for transfer or assignment of licenses where the subject license was acquired through a system of random selection to submit, together with its application, all associated documents that disclose the consideration received in return for the transfer or assignment of the license. The Auction Order must be reconsidered for the following reasons: 1) the applicability of the requirement is overly broad and beyond the scope intended by Congress, 2) the disclosure rules will be a significant drain on Commission resources, and 3) the Commission has failed to comply with the requirements of the Paperwork Reduction Act.

STATEMENT OF INTEREST

Through its subsidiaries, Geotek Communications, Inc. ("Geotek")¹ holds authorizations in the 900 MHz frequency band of the Specialized Mobile Radio ("SMR") service. In PP Docket No. 93-253, the Commission has, inter alia, adopted rules for a system of competitive bidding that will be used to license subscriber-based services such as SMRs, and certain reporting requirements applicable to licenses granted pursuant to lottery. Second Report and Order, __ FCC Rcd __ (Adopted March 8, 1994). As an SMR provider, Geotek has a direct interest in the regulatory treatment of the SMR service. With this interest in mind, Geotek filed comments in response to the Notice of Proposed Rule Making in this docket.² See Comments of Geotek Industries, Inc. (November 10, 1993). Thus, Geotek has standing to file this Petition for Reconsideration. 47 C.F.R.

¹ Geotek recently changed its name from "Geotek Industries, Inc." to "Geotek Communications, Inc." Geotek will comply expeditiously with any applicable FCC requirements arising from this change in name only.

² See Notice of Proposed Rule Making, Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) ("Auction Notice or NPRM").

§ 1.429(a).³

DISCUSSION

I. THE APPLICABILITY OF THE REPORTING REQUIREMENT IS OVERLY BROAD AND BEYOND THE SCOPE INTENDED BY CONGRESS

The Omnibus Budget Reconciliation Act of 1993,⁴ inter alia, required the Commission to examine the merits of adopting unjust enrichment requirements and to promulgate such rules "as are necessary" to prevent unjust enrichment where licenses are awarded through lotteries. The Commission defined "unjust enrichment" as "the transfer of a license acquired by lottery for substantial profit prior to providing service to the public."⁵

³ This Petition for Reconsideration is timely filed. 47 C.F.R. § 1.429(d). Because the Auction Order was published in the Federal Register on February 25, 1994, 59 Fed.Reg. 9100, 30 days after publication is March 28, 1994. See 47 C.F.R. § 1.4(b)

⁴ Pub. L. No. 103-66, title VI, § 6002(b)(1)(B), 107 Stat. 388, ____ (1993) ("Budget Act").

⁵ Auction Order, ____ FCC Rcd at n. 4 (emphasis added). In support of its definition, the Commission stated that "the legislative history of the Budget Act [was] highly critical of those who filed applications with no intention or capability of providing service but instead 'only sought to acquire a license at nominal cost and then sell it, making a large profit and at the same time delaying the delivery of services to the public.'" Auction Order, ____ FCC Rcd at para. 4; See also House Report at 259.

Although Geotek agrees with the FCC's definition of unjust enrichment, the final rules are much more expansive requiring instead that all applicants for voluntary transfer of control or assignment of an authorization acquired by lottery to satisfy the reporting requirement regardless of whether the seller-licensee commenced delivery of communications services to the public. Nothing in the Budget Act, the NPRM, or the Auction Order provides a basis for the more expansive reporting requirements.⁶ In applying the reporting requirements in the 900 MHz SMR context, it becomes clear that the rules are overly broad and contrary to the intent of Congress. Section 90.609(b) of the Commission's Rules prohibits the acquisition of an SMR license prior to the completion of construction.⁷ Therefore, because the new rules apply to transactions where

⁶ In fact, the Auction Order concedes that because of recently adopted rules to deter unjust enrichment in the lottery context and the advent of competitive bidding, "there does not appear to be a significant need at this time for new lottery rules to deter unjust enrichment." Id. at para. 10. Moreover, to the extent such rules discourage licenses from getting into the hands of parties that want to deliver services to the public, "additional transfer restrictions could operate to deprive the public of valuable new communications services, reduce economic growth and limit the expansion of jobs." Id. at para. 12.

⁷ See 47 C.F.R. § 90.609(b)

there can be no unjust enrichment, they are overly broad and conflict with the Congressional intent.⁸

The Commission could have adopted narrowly tailored reporting requirements consistent with Congressional intent by limiting the applicability of its rules to transactions involving licenses acquired by future lotteries where there has been no delivery of service to the public and requiring that transfer or assignment applications include a brief statement which discloses the consideration received in return for the license. The brief statement would be presumptively sufficient because Commission would, of course, always have the statutory authority to request additional documentation on a case by case basis. See 47 U.S.C. § 308(b).⁹ As modified, the reporting requirement would be more closely related to the legislative intent and the Commission's definition of unjust enrichment. This Petition includes an appendix that illustrates how the rule could have been more reasonably limited in scope.

⁸ The same is true in other services when construction has been completed. See Auction Order, ___ FCC Rcd at para. 9 (citing the IVDS, Cellular and MDS services).

⁹ Note that the applicant certifies to the truthfulness of its assertions on the application under penalty of law.

The mere fact that the requirement could have been more narrowly tailored, together with the lack of both adequate notice and support in the record,¹⁰ demonstrates its unreasonableness.¹¹

II. THE DISCLOSURE RULES WILL BURDEN THE COMMISSION'S RESOURCES AND THE COMMUNICATIONS INDUSTRY

The Auction Order requires parties to a voluntary transfer of control or assignment application to disclose all documents associated with such a transaction that would disclose the underlying consideration. Many of these documents will necessarily include propri-

¹⁰ The Commission failed to provide adequate notice that it intended to adopt the reporting requirements as required by the Administrative Procedures Act. 5 U.S.C. § 553. See also, McElroy Elecs. Corp. v. FCC, 990 F.2d 13251, 1357 (D.C. Cir. 1993). The Auction Order ignores the absence of any related proposals in the record and instead states that the statute "expressly recommended transfer disclosure requirements." Auction Order, FCC Rcd at para. 13. The subject provision, however, did not expressly recommend transfer disclosure requirements, but rather merely listed several anti-unjust enrichment measures that might be appropriate if the Commission found such measures "necessary". Moreover, because the final rules are substantively distinct and apply far more broadly than the tentative conclusion in the Auction Notice, the transfer disclosure rules are not a "logical outgrowth" of the proposed rules. Nat'l Black Media Coalition v. FCC, 791 F.2d 1016 (D.C. Cir. 1986), citing AFL-CIO v. Donovan, 757 F.2d 330, 338 (2d Cir. 1980).

¹¹ By its own admission, the Commission adopted rules beyond the scope intended by Congress to enable it to write a report to Congress; and adopted requirements that it concedes are unnecessary to help it to determine if such requirements might be necessary in the future.

etary information requiring confidentiality. In the Auction Order, the Commission states that the confidentiality can be protected by Section 0.459 of the Commission's Rules. 47 C.F.R. § 0.459.

To secure confidentiality, Section 0.459 requires an applicant to make its request in writing, identify the documents along with a statement of the reasons. The request and the documents must be submitted with (in this case) the application for transfer of control or assignment and where feasible, be physically separated. Requests which comply with the above requirements are then acted on by the appropriate Bureau or Office Chief. If a request is denied, the applicant may file an application for review with the Commission. 47 C.F.R. § 0.459(g). If the application for review is denied, the applicant may appeal the decision to the court and seek a judicial stay of the ruling.¹²

Therefore, not only must the Commission staff act on the application for transfer or assignment itself, it will also be required in most instances to decide the issue of confidentiality. In addition, if

¹² If a request is granted, any person may still submit a request for inspection pursuant to Section 0.461. 47 C.F.R. § 0.459(h).

the request for confidentiality is denied, then additional staff resources must be devoted to handling the subsequently filed application for review and appeal. Because the new rules are merely reporting requirements and not accorded decisional weight, the application should continue to be processed while the confidentiality request is pending which could ultimately result in litigating a single applicant in two fora. Thus, to implement the new transfer disclosure rules, the FCC will expend many more resources than currently required to process a routine transfer or assignment application and delay the delivery of service to the public.¹³

¹³ In this manner, the new transfer disclosure rules conflict with the principles of reinventing government. See Vice President Al Gore, Report of the National Performance Review, Creating a Government that Works Better and Costs Less (September 7, 1993). Moreover, the new rules also conflict with the Commission's recent authorization of electronic filing, the stated goal of which was to speed delivery of service to the public. See In the Matter of Procedures for Electronic Filing of Applications in the Private Radio Services, DA 93-1574, 9 FCC Rcd 174 (Released: January 6, 1994).

III. THE AUCTION ORDER FAILS TO COMPLY WITH THE PAPERWORK REDUCTION ACT

The Commission is barred by the Paperwork Reduction Act (the "Act") from implementing the new transfer disclosure rules because Office of Management and Budget ("OMB") has not had an opportunity to review the information collection request. 44 U.S.C. § 3507(a)(1). The Commission failed to submit the subject reporting requirement to OMB no later than the date of publication of the NPRM in the Federal Register as required. 44 U.S.C. § 3504(h)(1).

The Commission's failure to seek OMB approval is apparently due to its conclusion that the Act does not apply because the reporting requirements would affect fewer than ten "persons" annually. 59 Fed.Reg. 9100, 9101 para. 5 (February 25, 1994). Assuming that by the term "persons" the Commission was referring to "applicants", Geotek respectively disagrees with the Commission's conclusion. Under the new requirements, Geotek alone would be compelled to file annually more than 10 applications for transfer of control or assignment of (fully constructed) SMR licenses acquired by lottery. In addition, Geotek notes that this requirement applies to more radio services than SMRs. See 47

C.F.R. §§ 1.924(d), 21.38(g), 22.39(d), 90.153, 94.47(c), and 95.821. Therefore, Geotek submits that the Commission erroneously concluded that the Act does not apply to the new transfer disclosure rules.

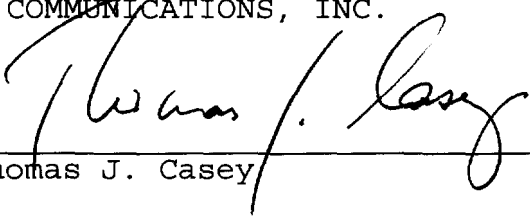
CONCLUSION

For the foregoing reasons, Geotek respectfully requests that, upon reconsideration, the Commission remove its transfer disclosure requirements from the rules, or alternatively, modify them so that they are more narrowly tailored and consistent with the legislative intent and the Commission's policies.

Respectfully submitted

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By:


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Its Attorney

Dated: March 28, 1994

APPENDIX

The current text of the reporting requirements reads as follows:

An applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option purchase; below market financing).

Auction Order, __ FCC Rcd at Appendix.

The text of the reporting requirement, modified as discussed in the Geotek Petition for Reconsideration, would read as follows (with added text underlined and deletions in brackets):

An applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection after the effective date of the rules in the First Report and Order, PP Docket No.

93-253, Fed.Reg. (1994) and the transferor or assignor has not commenced delivery of service to the public, shall, together with its application for transfer of control or assignment, file with the Commission [] a brief statement disclosing the consideration that the [] transferor or assignor would receive in return for the transfer or assignment of its license. This [] statement should also [] reflect any material future, contingent, in-kind, or other consideration [] where appropriate.